UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OKLAHOMA

STATE OF OKLAHOMA, et al.,	)	
	)	
Plaintiffs,	)	
	)	
v.	)	**05-CV-0329 GKF-SAJ**
	)	
TYSON FOODS, INC., et al.,	)	
	)	
Defendants.	)	

THE CARGILL DEFENDANTS' MOTION TO COMPEL AND BRIEF IN SUPPORT

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Pursuant to Federal Rule of Civil Procedure 37(a), Defendants Cargill, Inc. ("Cargill") and Cargill Turkey Production, LLC ("CTP") (together, the "Cargill Defendants") respectfully move this Court to compel the State to fully answer Cargill's Amended First Set of Interrogatories and Requests for Production of Documents and CTP's Amended First Set of Interrogatories and Request for Production, both served on August 22, 2006. The State served its Objections and Responses to each set of Requests for Production on October 31, 2006 and its responses to each set of Interrogatories on December 11, 2006;[1]

I. INTRODUCTION

The State's First Amended Complaint alleges that seven different compounds or constituents, including phosphorus, have caused and are causing a variety of harm and damages to the IRW and the people of Oklahoma. The State's allegations are both broad and vague. The Cargill Defendants therefore served detailed Interrogatories and Requests for Production of Documents on the State in an effort to clarify the State's allegations and discover the bases for these claims.[2] As demonstrated in this Motion to Compel, the State's discovery responses fail to define, narrow, explain, or clarify the State's far-reaching allegations.

The Cargill Defendants specifically address the following deficiencies in this Motion:

- The State responds that documents may be found at one of eight agencies or offices of the State without specifying which agency or office actually maintains responsive documents, or which documents are responsive to which Requests;

[1] The State's responses to the Cargill Defendants Interrogatories and Requests for Production of Documents are attached as Exhibits 1-4.

[2] The State initially refused to answer any Interrogatories on grounds that more than 25 Interrogatories in this complex case was excessive. This Court granted the Cargill Defendants' motion to compel on October 24, 2006 and required the State to answer. (Dkt. 956.)

- The State fails to specify which documents are responsive to which Interrogatories contrary to the requirements of Rule 33(d); and
- The State's response to Interrogatories fail to provide sufficient detail. Examples include: failure to identify witnesses with knowledge; generic references to reports and assessments; and references back to the Complaint. Specifically, the State fails to provide information that the poultry industry is a source of the seven constituents and compounds named in the Complaint and how those seven constituents and compounds are causing health hazards, endangering health and the environment, or endangering the public's health and safety.

The Cargill Defendants cannot discern what the State believes is relevant and responsive, nor can they determine what the State has withheld subject to their objections or claims of privilege or confidentiality. Further, the State's privilege logs are insufficient and incomplete.

Pursuant to LCvR 37.1, the Cargill Defendants have met and conferred in good faith with counsel for the State, and have made a sincere attempt to resolve their differences, as demonstrated below:

- On November 9, 2006, the Cargill Defendants sent a deficiency letter to the State outlining topics for the parties' initial meet and confer conference. (Letter of 11/9/06, attached as Ex. A to Affidavit of Theresa N. Hill, Ex. 5.)
- The parties met on December 8 and again on December 14, 2006, to discuss the State's responses and objections to the propounded discovery requests. (Affidavit at ¶ 4, Ex. 5)

- On January 4, 2007, the Cargill Defendants sent a letter to the State confirming these discussions and outlining deficiencies regarding the requests for production. (Letter of 1/4/07, attached as Ex. B to Affidavit, Ex. 5.)
- The letter of January 4 went unanswered. Having received no response, on January 16, 2007, the Cargill Defendants reiterated their request for the State to supplement their discovery responses. (Letter of 1/16/07, attached as Ex. C to Affidavit, Ex.5)
- On January 17, 2007, the Cargill Defendants provided the State with a detailed deficiency letter regarding the interrogatories. (Letter of 1/17/07, attached as Ex. D to Affidavit, Ex. 5).
- As of February 14, the Cargill Defendants have received no such response and no supplementation. (Affidavit at ¶ 8, Ex. 5.)

The Cargill Defendants are unable to reach an accord with the State and now respectfully request that the Court compel specific and complete discovery responses from the State.

II. ARGUMENT

In the absence of any real progress toward resolution of this dispute, the Cargill Defendants seek this Court's intervention, and dispute the sufficiency of the State's responses to:

- All 17 interrogatories served by Cargill;
- All 3 requests for production served by Cargill;
- All 19 interrogatories served by CTP; and
- Document Request Nos. 4-23 and 25-57 served by CTP.

In addition, the State's privilege logs fail to satisfy the basic requirements of Federal Rule of Civil Procedure 26(b)(5) and include materials that are not privileged. The Cargill Defendants finally challenge the State's use of General Objections.

A. The State Failed to Properly Categorize Documents Possessed by Specific State Agencies.

A responding party is required to address each item or category in the request for production. Fed. R. Civ. P. 34(b); *see also* 7 Moore's Fed. Practice – Civil § 34.13(2)(a) (2006). If the responding party opts for a document inspection, as the State did here, it must specify a "reasonable . . . manner" for inspection. FED. R. CIV. P. 34(b). Producing documents in a box in no discernible order is insufficient to meet this burden. *See T.N. Taube Corp. v. Marine Midland Mortgage Co.*, 136 F.R.D. 449, 456 (W.D.N.C. 1991). *See also Stiller v. Arnold*, 167 F.R.D. 68, 70-71 (N.D. Ind. 1996) ("producing 7,000 documents in no particular order does not comply with a party's obligation under Rule 34(b).")

Under Rule 34, the State may produce responsive documents in either of two ways. The State either "shall produce them as they are kept in the usual course of business or shall organize and label them to correspond with the categories in the request." FED. R. CIV. P. 34(b). Rule 34 is designed "to prevent parties from "deliberately . . . mix[ing] critical documents with others in the hope of obscuring significance." FED. R. CIV. P. 34 advisory committee note (1980); *see also Johnson v. Kraft Foods N. Am., Inc.*, 236 F.R.D. 535, 540 (D. Kan. 2006). "[M]erely categorizing the documents produced does not, without some further explanation, satisfy the requirement that they be produced as kept in the usual course of business." *Cardenas v. Dorel Juvenile Group, Inc.* 230 F.R.D. 611, 618 (D. Kan. 2005); *see also T.N. Taube Corp.*, 136 F.R.D. at 456 (noting the

improbability that a party actually in the ordinary course "routinely haphazardly stores documents in a cardboard box," as the documents were produced).

The State responds that eight different state agencies and offices are in possession or control of documents or information responsive to the Cargill Defendants' requests. However, the State will not specify which agency or office is in possession of specific categories of responsive documents. This failure violates Rule 34. The State responded to many of the Cargill Defendants' requests by indicating that an unidentified state agency or office may have responsive documents. (Ex. 2, CTP Request Nos. 8-10, 13-15, 18, 21, 23, 25, 28-33, 36-42, 44-46, 49, 50, 52-57; Ex. 1, Cargill Request Nos. 1-3.) To other requests, the State indicated that particular agencies may have responsive documents, but failed to indicate whether other state agencies also possess responsive documents. (Ex.2, CTP Request Nos. 6, 16, 17, 19, 20, 22, 26, 27, 34, 35, 48, 51.)

Compounding the practical difficulties raised by the State's method of response, the State is requiring the Cargill Defendants to conduct on-site inspections at the agencies and offices, instead of producing document copies. To date, four on-site inspections have taken place.[3] At each inspection, the State has provided numerous bankers boxes each containing thousands of documents, without bates numbers. (Affidavit at ¶¶ 10 -13, Ex. 5). The State provided charts listing the various

[3] On-site inspections have occurred at the Oklahoma Department of Environmental Quality ("ODEQ"), Water Resources Board ("OWRB"), Conservation Commission ("OCC"), and Oklahoma Scenic Rivers Commission. The State has also confirmed a date for the inspection of documents maintained by the Office of the Secretary of the Environment ("OSE"). At the December 15, 2006 hearing, the State's counsel advised the Court that dates had been set for on-site inspections at the OSE, the Oklahoma Department of Wildlife Conservation, and the Oklahoma Department of Recreation and Tourism. However, as of the date of this Motion, only the date for the OSE has been shared with the Cargill Defendants. (Letter of 1/4/07, Ex. B to Affidavit, Ex. 5).

discovery requests from several Defendants and the boxes that contain documents responsive to those requests. (*See* Charts, attached as Exs. 6-8.) The charts generally refer to numerous boxes that should contain documents responsive to identified CTP request for production. However, the charts do not even attempt to address CTP or Cargill's interrogatories being answered with documents pursuant to Rule 33(d). (*Compare id. with* CTP Interrog. Nos. 1-9, 13, 15, 16 & Cargill Interrog. Nos. 1-8, 12-17.)

This manner of production makes it impracticable to determine which documents are responsive to which request for production – and impossible to determine which documents are responsive to which Rule 33(d) interrogatory. For instance, CTP Request for Production No. 27 seeks "documents relating to any study, review, evaluation, investigation, sampling or analysis of any byproduct of water treatment plant processes (including but not limited to trihalomethanes) and cancer." (Ex. 2, CTP Request No. 27). The ODEQ production chart indicates that documents responsive to this request are found in Legal Boxes 1-8 and Water Quality Division Boxes 1, 4-20, 22-25, 29-31, 33-37, 40, 45, 46, 49-55, 57-61, 69-71. (ODEQ Chart, Ex. 6). The OCC production chart indicates that documents responsive to CTP Request No. 27 are found in Boxes 1, 1B, 8B, 11B, 13A; Boxes 6-10 of the Administration Division; and Boxes L1, L2, L3, L4, L7, L8, L9. (OCC Chart, Ex. 7). In reviewing the more than 45 boxes of documents that may contain documents to CTP Request No. 27, the Cargill Defendants have found thousands of pages of documents with no reference to byproducts of water treatment plant processes. For example, ODEQ Legal Box 8 contains various district court filings, correspondence relating to sewage complaints, septic tank pumpings, and landfills. (Excerpt from ODEQ Index for Legal Box 8, Ex. 9). These documents

clearly do not relate to any study, review, evaluation, investigation, sampling, or analysis of any byproduct of water treatment plant processes.

The Cargill Defendants are left with the overwhelming task of attempting to correlate documents with discovery requests, despite the fact that the State necessarily performed that very task in creating their document production charts. Hence, the Cargill Defendants are not only unfairly burdened, but also deprived of a means to confirm that the State actually produced all responsive documents.

In early October, the Cargill Defendants raised state agency document production as a potential logistical issue and requested that, should the State produce particular agency documents for on-site inspection, "the written response to each request [w]ould identify both the agency that possesses the responsive documents and the specific category of responsive documents that [the Cargill Defendants] can expect to find at the identified agencies." (Ex. 10, Letter of 10/10/06; *see also* Letter of 1/4/07, Ex. B to Affidavit, Ex. 5). The Cargill Defendants repeatedly requested this information. (*See* Letter of 11/9/06, Ex. A to Affidavit, Ex. 5). To date, the State has not supplemented their discovery responses nor confirmed their willingness to do so. (Affidavit at ¶ 8, Ex. 5).

The State's method of document production does not satisfy their obligations under Rule 34(b). Such document production is insufficient to prove that the documents were produced as kept in the ordinary course. *See Johnson*, 236 F.R.D. at 540-41; *Cardenas*, 230 F.R.D. at 618. Accordingly, the Cargill Defendants request an order requiring the State to specify as to each request which state agencies or offices have responsive information, and to categorize documents according to the Request for Production to which that category of documents responds.

B. The State's Responses to Interrogatories Are Deficient.

The State's Interrogatory responses fail to fulfill the State's obligations under the Federal Rules in three primary ways. First, many responses invoke Federal Rule of Civil Procedure 33(d) but fail to comply with that Rule. Second, many of the State's answers lack adequate detail. Third, the State refuses to answer any contention interrogatories.

1. The State Fails to Specify Which Documents Are Responsive to Which Interrogatories as Required by Rule 33(d).

Instead of providing answers, the State has opted to produce business records containing purported to include information in response to CTP Interrogatory Nos. 1-9, 13, 15, 16 and Cargill Interrogatory Nos. 2-8, 10-12, 14-16, citing Rule 33(d). (Exs.4 and 3, respectively.) The State's responses, however, fail to specify the documents from which the answers to these interrogatories may be derived.

A party that opts to produce business records in lieu of answering an interrogatory must specify the records in sufficient detail for the propounding party to locate and identify – as readily as the responding party – the records from which the answer to that particular interrogatory may be ascertained. FED. R. CIV. P. 33(d); *Oleson v. K-Mart Corp.*, 175 F.R.D. 560, 564 (D. Kan. 1997). "A broad statement that the information sought is available from a mass of documents and that the documents are available for inspection simply is not a sufficient response to satisfy the aims of discovery." *Flour Mills of Am., Inc. v. Pace*, 75 F.R.D. 676, 682 (E.D. Okla. 1977). Likewise, a respondent "may not avoid answers by imposing on the interrogating party a mass of business records from which the answers cannot be ascertained by a person unfamiliar with them." *Oleson,* 175 F.R.D. at 564 (citations omitted). The responding party must "specifically designate what business records answer each interrogatory." *Pulsecard, Inc. v. Discover Card Servs.*, 168 F.R.D.

295, 305 (D. Kan. 1996). If a party is unable to comply with Rule 33(d), "it must otherwise answer the interrogatory fully and completely." *Oleson,* 175 F.R.D. at 564 (citations omitted).

The requirement of specificity ensures against misuse of the Rule 33(d) production option. *Rainbow Pioneer No. 44-18-04A v. Hawaii-Nevada Inv. Corp.*, 711 F.2d 902, 906 (9th Cir. 1983) (party violated Rule 33(d) by making vague references to nondescript documents). To satisfy the specificity requirement, the respondent should list the exact documents and indicate the page or paragraphs that are responsive to the interrogatory. *Colorado v. Schmidt-Tiago Constr. Co.*, 108 F.R.D. 731, 735 (D. Colo. 1985). Courts outside the Tenth Circuit have also found that the responding party must at least categorize documents. *E.g., Exxon Chem. Patents, Inc. v. Lubrizol Corp.*, 131 F.R.D. 668, 672 (S.D. Tex. 1990), *rev'd on other grounds*, 137 F.3d 1475 (Fed. Cir. 1998).

Here, the State repeatedly invoked the business record option without ever specifying responsive documents. Instead, the State improperly contended that it is the Cargill Defendants' responsibility to determine which documents are responsive to their discovery requests:

> However, given the number, the breadth, and the degree to which the many requests for production and interrogatories overlap, it is impossible to comprehensively state each and every request for production or interrogatory to which documents in each box respond. Therefore, it is the responsibility of examining counsel to review the documents produced ro [sic] responsiveness and to determine, which, if any, should be copied for purposes of the defense.

(OCC letter to Counsel, Ex. E to Affidavit, Ex. 5.) Under no circumstances does Rule 33(d) require a propounding party like the Cargill Defendants to ascertain as to particular interrogatories the responsiveness of documents within a vast production.

If the State is unable for whatever reason to comply with requirements of the Rule 33(d) option, "it must otherwise answer the interrogatory fully and completely." *Oleson,* 175 F.R.D. at

564. The Cargill Defendants ask that the Court compel the State to supplement its responses with specific document indications or otherwise fully and completely answer CTP Interrogatory Nos. 1-9, 13, 15, 16 and Cargill Interrogatory Nos. 2-8, 10-12, 14-16.

2. The State's Answers to Interrogatories Lack Sufficient Detail.

Interrogatories may properly inquire into an opponent's contentions in the case and the factual basis therefor. *Cont'l Ill. Nat'l Bank & Trust Co. v. Caton*, 136 F.R.D. 682, 684 (D. Kan. 1991) (citations omitted). "The defendant is entitled to know the factual basis of plaintiff's allegations and the documents which the plaintiff intends to use to support those allegations." *Id.* Accordingly, answers to interrogatories must include detail sufficient to respond fully to the question, and cannot evade the question asked. *Id.* ("answers to interrogatories must be responsive, full, complete and unevasive") (*quoting Miller v. Doctor's General Hosp.*, 76 F.R.D. 136, 140 (W.D. Okla. 1977). *Accord Herdlein Techs., Inc. v. Century Contractors, Inc.*, 147 F.R.D. 103, 107 (W.D.N.C. 1993).

A sampling of the State's responses reveals that the State has failed to respond to the Cargill Defendants' interrogatories fully, completely, and without evasion:

- **Failure to Identify Any Witnesses.** Several of the Cargill Defendants' Interrogatories seek the names of any witnesses with responsive information. (Ex. 4, CTP Interrog. Nos. 3-4, 9, 12-18; Ex. 3, Cargill Interrog. Nos. 1-17.) The State failed to identify a single witness in its discovery responses.
- **Seven Compounds / Constituents At Issue.** CTP Interrogatory Nos. 3 and 4 seek particular information relating to the core allegation that the poultry industry is a source of the seven compounds or constituents named in the Complaint. In addition

to listing boilerplate objections, the State claims Interrogatory 3 is irrelevant and not likely to lead to admissible evidence. (Ex. 4 at 6.) The State refuses to provide a particular answer to CTP Interrogatory No. 3, but then refers back to the No. 3 response for the response to No. 4. (*Id.* at 6-8.)

- **Generic Report References**. In response to CTP Interrogatory No. 7, the State simply directs the Cargill Defendants to "Beneficial Use Monitoring Program ('BUMP') reports, clean lake studies, and other scientific reports," without identifying the purportedly responsive reports and studies. (*Id.* at 10-11.)
- **Reference Back to the Complaint**. Cargill Interrogatory No. 9 seeks the legal and factual basis for the allegations in ¶ 56 of the First Amended Complaint that any Cargill entity's "poultry waste disposal practices are not, and have not been, undertaken in conformity with federal and state laws and regulations." (Ex. 3 at 16-17.) In response, the State refers to "other paragraphs of the First Amended Complaint which allege violations of state and federal laws and regulations," and instructs that "the legal basis for this allegation appears in the First Amended Complaint." (Ex. 3 at 16-17.) References back to a complaint are not proper interrogatory answers. *Cont'l Ill. Nat'l Bank*, 136 F.R.D. at 686.
- **Allegations of Public Health Danger**. Cargill Interrogatory Nos. 8 and 12 seek information relating to the State's specific and separate allegations involving health hazards, endangerment to health or the environment, and danger to the public's health and safety. (Ex. 3 at 15-16; 19-20; and 24-25.) Rather than providing the

requested information, in response to Interrogatory Nos. 8 and 12, the State refers Cargill to other responses that contain no specific information. (Ex. 3 at 15-16, 20.)

"The answers to interrogatories must be responsive, full, complete and unevasive." *Cont'l Ill. Nat'l Bank*, 136 F.R.D. at 684 (*quoting Miller*, 76 F.R.D. at 140). Because the State has failed to so answer the propounded Interrogatories, the Cargill Defendants ask the Court to order the State to provide a responsive, full, complete, and unevasive answer to each Interrogatory.

3. The State Objects to Answering Contention Interrogatories.

The State objects to Cargill Interrogatory Nos. 1-8, 12-17 and CTP Interrogatory Nos. 9, 13-18 as premature "contention" interrogatories. (Ex. 4 at 12-14; 17-27.) Contention interrogatories are proper. *Steil v. Humana Kan. City, Inc.*, 197 F.R.D. 445, 447 (D. Kan. 2000); *Cook v. Rockwell Int'l Corp.*, 161 F.R.D. 103, 106 (D. Colo. 1995) (*citing Bohannon v. Honda Motor Co.*, 127 F.R.D. 536 (D. Kan. 1989)). Contention interrogatories are especially appropriate in this case, as Defendants have moved the Court to enter a "Lone Pine order," but no order has been entered. (*See* Defs. Mot. Entry Case Mgmt. Ord. & Integrated Brief in Supp., filed 10/17/06, Dkt. 946.)

The Cargill Defendants' contention interrogatories are not premature. Even early in the discovery process, contention interrogatories are an appropriate way for defendants to determine the basis of a complaint. *Johnson*, 236 F.R.D. at 544-45 (explaining that due to "the simplicity of notice pleading, Plaintiff should provide as much information as possible regarding his claims without delay and as early as required."). Through their interrogatories, the Cargill Defendants seek the factual basis of the State's allegations, which the State first asserted more than a year and a half ago. The State "must be aware of some of the specific facts upon which the allegations in his Complaint are based, otherwise [it] would not have made the allegations in the first place." *Id.*

The State has announced that they will soon seek a preliminary injunction in this matter, creating an immediate need for the Cargill Defendants to ascertain the State's theories of liability. (Pls. Mot. Entry Sched. Ord., Dkt. # 1026 at 2.) Hence, the Cargill Defendants request that the Court compel the State to answer all contention interrogatories by no later than thirty days from the date of this Court's Order.

C. The State's Privilege Logs Are Insufficient.

Rule 26(b)(5) requires a party claiming any privilege to "describe the nature of the documents, communications, or things not produced or disclosed in a manner that, without revealing information itself privileged or protected, will enable other parties to assess the applicability of the privilege or protection." The asserting party must demonstrate the basis and existence of the privilege. *Barclaysamerican Corp. v. Kane*, 746 F.2d 653, 656 (10th Cir. 1984); *Fondren v. Republic Am. Life Ins. Co.*, 190 F.R.D. 597, 599 (N.D. Okla. 1999)). Failure to meet this burden may result in loss of the privilege. *See, e.g.*, *Fondren*, 190 F.R.D. at 599.

Here, the State provided four privilege logs to the Cargill Defendants.[4] Each log either is incomplete, fails to provide sufficient information to determine the validity of the privilege claim asserted, or both.[5] In addition, the State asserts privileges or other claims of confidentiality on

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[4] The State produced a privilege log for documents produced by the OCC, the OWRB, ODEQ and OSRC. (Exs. 11-14). During the meet and confer conferences, the State referred to a General Privilege Log that attached to the State's responses to discovery from Defendant Cobb-Vantress, Inc. (Ex. 15, General Privilege Log and Ex. 16, Revised General Privilege Log).

[5] Although the privilege logs purport to satisfy the requirements of N.D. Okla. Local Civil Rule 26.4, the inquiry does not end there. Even if the local rule were satisfied, the court must have sufficient information from the privilege log to determine the existence of a privilege. *See, e.g., Caplan v. Fellheimer Eichen Braverman & Kaskey*, 162 F.R.D. 490, 492 (E.D. Pa. 1995).

documents that appear to be non-privileged, and improperly asserts the work product and trial preparation materials protection as to interrogatories.

1. The Privilege Logs are Facially Insufficient.

The privilege logs objectively fail for several reasons. In particular:

- **No Redactions**. The State refuses to provide any privilege log for the redactions made on documents that it produced. (Letter of 1/4/07, Ex. B to Aff., Ex. 5).
- **Incomplete Entries**. Where a document is listed on a privilege log, the entry is often incomplete. For example, the State asserts work product protection and attorney client privilege on documents with no listed author or recipients. (*E.g.*, OCC Priv. Log Nos. 3 & 25, attached as Ex. 11; OWRB Priv. Log No. 104, attached as Ex. 12; ODEQ Priv. Log No. 148, attached as Ex.13.)
- **No Lawyer Indicated on Attorney-Client Communications**. The logs list numerous documents asserted to be privileged as authored by non-lawyers with no indication that any of the recipients are attorneys. (*E.g.*, Ex. 11 [OCC Log], Nos. 4, 8, 22, 23, & 24; General Privilege Log Nos. 299, 303-307, attached as Ex. 15 and Ex. 16; Ex. 12 [OWRB Log], Nos. 18, 31, 21-23, 47, 53-54, 57, 65, 74-75, 79-87; Ex. 13 [ODEQ Log], Nos. 19-20, 34-35, 46, 54, 60, 70, 72, 75, 78-91, 93-95, 107-110, 112-15, 124, 129, 134-36, 140, 148, 152.)
- **Contradictory Entries**. Some privilege log entries seemingly contradict each other. For example, "Dean Couch" is listed as the author and a lawyer of several documents in OWRB Privilege Log Nos. 21-23, 27, 28, 57, and 102-03. (Ex. 12.)

Nonetheless, in other places in the same log, "Dean Couch" is listed as an author, but not an attorney. (*Id.*, Nos. 38, 42, 46, 47, 53, 54, 65, 80, 81, 84, 97, 99.)

- **No Date of Last Entry**. The State has not provided the end dates for the privilege log entries.

Neither this Court nor the Cargill Defendants can resolve these discrepancies from the face of the privilege logs; thus, the logs do not comply with Rule 26(b)(5). When the Cargill Defendants approached the State to resolve these issues, the State initially agreed to review the privilege logs and, if necessary, to supplement them. (Letter of 1/4/07, Ex. B to Aff., Ex. 5). Despite subsequent discussions, the State has neither supplemented the privilege logs nor stated their position on the sufficiency of the privilege logs. (Aff. ¶ 9, Ex. 5)

The Cargill Defendants therefore ask the Court to Order the State to supplement their privilege logs by: (1) preparing a privilege log for all redacted documents; (2) providing additional information on the entries in which no author or recipient is listed; (3) providing the titles or roles of all authors and recipients, more detailed subject matter descriptions, and clarification of the privilege asserted; (4) correcting the contradictory information in the privilege logs regarding Mr. Dean Couch; and (5) providing the last date of entry for each privilege log.

2. The State Improperly Asserts Generic Privileges to the Production of Non-Privileged Documents.

The party seeking to assert the attorney-client privilege or work-product doctrine to bar discovery bears the burden of establishing the applicability of the protection claimed. *Barclaysamerican*, 746 F.2d at 656 (*citing, e.g., Feldman v. Pioneer Petroleum, Inc.*, 87 F.R.D. 86, 88 (W.D. Okla. 1980)). Generic claims of privilege are improper. A "bald assertion that production

of the requested documents would violate a privilege is not enough." *Biliske v. Am. Live Stock Ins. Co.*, 73 F.R.D. 124, 126 (W.D. Okla. 1977).

The State asserts various privileges on documents responsive to CTP Request for Production Nos. 4-14, 16, 18-23, 25, 33, 37-53, and 55-56, and to all 17 Cargill Requests for Production. The documents subject to these requests for production include maps and photographs of the IRW; communications with third parties such as growers, federal agencies and other governmental entities; complaints; and numerous other plainly non-privileged categories. The Cargill Defendants ask the Court to compel the State either to indicate the specific bases for asserting such privileges in response to the above-referenced Requests for Production or to withdraw these generic claims of privilege.

3. The State Improperly Claims Work Product and Trial Preparation Protection In Response To Interrogatories.

The State improperly asserts the work-product and trial-preparation-materials protection in response to the Cargill Defendants' Interrogatories. (Ex. 3, Nos. 4-9, and 13-15; Ex. 4, Nos. 1-17.) These Interrogatories seek the basis for statements made to the Court at hearings and in pleadings. After the hearing of December 15, 2006, this Court ruled that the State waived any work product or trial preparation protection by placing such information "at issue." (Order of 1/5/07 at 5, Dkt. # 1016). Accordingly, the Cargill Defendants ask the Court to compel the State to provide responsive information and to remove any objection based on work product or trial preparation protection to CTP Interrogatory Nos. 4-9, 13-15 and Cargill Interrogatory Nos. 1-17.

D. The State's "General Objections" Prevent the Cargill Defendants from Determining the Sufficiency and Completeness of the Responses.

The State's purported wholesale "incorporation" of General Objections into each individual discovery response prevents the Cargill Defendants from determining whether the State has *actually* withheld responsive information or documents on the basis of such General Objections.[6] The Court should require the State to remove those General Objections, if any, under which no documents have actually been withheld.

In addition, several General Objections contain discrete objections that are inherently improper. The Cargill Defendants have challenged the validity of particular General Objections to no avail (Exs. A and D to Affidavit, Ex. 5), and now seek an Order striking the following:

1. General Objection 2 / G: Documents that Cargill Defendants May Have.

The State contends that it will not produce information or documents already in the possession of the Cargill Defendants. This is an improper objection. *E.g., Herdlein Techs.*, 147 F.R.D. at 105. Whether the party seeking discovery potentially knows facts it seeks is irrelevant because one purpose of discovery is to determine what the adverse party contends the facts to be. *See S.E.C. v. Cymaticolor Corp.*, 106 F.R.D. 545, 549 (S.D.N.Y. 1985). The idea is particularly apt here, as the State has yet to advise the Cargill Defendants of what facts it views to be salient, even though this litigation ensued in June 2005. The Court should strike this objection.

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[6] The State asserts eleven Interrogatory General Objections and numerous Request for Production General Objections, grouped together into nine categories, A-I. Courts in the Tenth Circuit have found that a responding party "cannot make conclusory allegations that a request is irrelevant, immaterial, unduly burdensome or overly broad," *Gheesling v. Chater*, 162 F.R.D. 649, 650 (D. Kan. 1995), but must instead provide an explanation demonstrating why providing such information would be burdensome, time-consuming, or expensive, *In re Urethane Antitrust Litig.*, 237 F.R.D. 454, 454 (D. Kan. 2006) (*quoted in Metzger v. Am. Fid. Assur. Co.*, 2006 U.S. Dist. LEXIS 79956, at *25-26 (W. D. Okla. Oct. 31, 2006)). Instead, a "party resisting discovery must show specifically how each discovery request is irrelevant, immaterial, unduly burdensome or overly broad." *Gheesling*, 162 F.R.D. at 650. The State's general objections demonstrate just these failings, and the Court should overrule them.

2. General Objection 3 / B: Overbroad, Overly Expensive.

The State appears to have withheld information responsive to CTP Interrogatory Nos. 3 and 4 and Cargill Interrogatory Nos. 9, 10, 11 on grounds that the requests are overly expensive to answer and overly burdensome, but provided no detail regarding the claimed expense or burden. Boilerplate objections of overbreadth and undue burden with no explanation are improper. *Gheesling*, 162 F.R.D. at 650. The Court should strike General Objections 3 and B.

3. General Objection 2 / E: Third Party Sources.

The State objects to producing information or documents that may also be in the possession of a third party source. The Federal Rules impose a duty on each party to furnish any and all responsive information sought in discovery, and make no general exception for information that might also be available from other, unspecified sources. *See, e.g., Trane Co. v. Klutznick*, 87 F.R.D. 473, 476 (W.D. Wis. 1980). The Court should direct the State to provide the responsive information in its possession.

4. General Objection 5: Contention Interrogatories.

As discussed above, the Cargill Defendants' contention interrogatories are proper and not premature. *See Johnson*, 236 F.R.D. at 544-45. The Court should strike the State's General Objection that all contention interrogatories are premature.

In sum, the Cargill Defendants request that the Court strike the improperly asserted General Objections.

III. CONCLUSION

As outlined above, the State's objections to the Cargill Defendants' discovery requests are improper and the responses inadequate. The Cargill Defendants respectfully request that this Court

compel the State to supplement their discovery responses consistent with this Motion, as detailed in the accompanying Proposed Order.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify that on the 14th day of February, 2007, I electronically transmitted the attached document to the Clerk of Court using the ECF System for filing and transmittal of a Notice of Electronic Filing to the following ECF registrants:

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I also hereby certify that I served the attached documents by United States Postal Service, proper postage paid, on the following who are not registered participants of the ECF System:

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